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11 **UNITED STATES DISTRICT COURT**  
12 **CENTRAL DISTRICT OF CALIFORNIA**

13 **PRESTON SMITH, an**  
14 **individual,**

15 **Plaintiff,**

16 **vs.**

17 **CITY OF BURBANK,**  
18 **BURBANK POLICE**  
19 **DEPARTMENT, BURBANK**  
20 **POLICE DEPARTMENT**  
21 **OFFICER GUNN; BURBANK**  
22 **POLICE DEPARTMENT**  
23 **OFFICER BAUMGARTEN;**  
24 **BURBANK DEPARTMENT**  
25 **POLICE OFFICER EDWARDS,**  
26 **AND DOES 1 TO 100, inclusive,**

27 **Defendants.**

**Case No.: CV 10-8840 VBF (AGRx)**

**Honorable Valerie Baker Fairbank**

**PLAINTIFF'S OPPOSITION TO**  
**MOTION FOR SUMMARY**  
**JUDGMENT**

**APPLICATION FOR AN ORDER**  
**DENYING, DEFERRING OR**  
**CONTINUING DEFENDANTS'**  
**MOTION FOR SUMMARY**  
**JUDGMENT**

**DECLARATIONS OF PLAINTIFF**  
**PRESTON SMITH AND MAX A.**  
**SAULER, ESQ., IN SUPPORT OF**  
**APPLICATION**

**MEMORANDUM OF POINTS**  
**AND AUTHORITIES**

**DATE: May 16, 2011**  
**TIME: 1:30 p.m.**  
**COURTROOM: 9**



1 the Defendants' Motion for Summary Judgment is made pursuant to F.R.C.P., Rule  
2 56 (d), for good cause shown, and was initially presented to the court on April 22,  
3 2011.  
4

5  
6 DATED: April 26th, 2011

LAW OFFICES OF MANUEL H. MILLER

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10 By  \_\_\_\_\_

Max A. Sauler, Esq.

Attorneys of Record of Plaintiff  
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**DECLARATION OF PRESTON SMITH**

I, Preston Smith., declare and state as follows:

1. I am the Plaintiff in the above captioned action. I know the following facts of my own personal knowledge, except where stated on information and belief. If called upon and sworn as a witness, I could and would competently testify thereto.

2. On April 10, 2009 I was being questioned by City of Burbank Police Officers near a liquor store in the City of Burbank. After being questioned by the City of Burbank Police Officers I ran from the Police Officers.

3. I was apprehended by the Police Officers and was tasered in my low back by Officer Gunn and at which point I fell to the ground immobilized. While lying on the ground, in a face down position, I told Officer Gunn that "OK, you've got me." I remained face down on the ground and I did not attempt to move or stand up. Officer Gunn continued to taser me a second and third time, causing me to go into convulsions. While I was still immobilized on the ground, I begged Officer Gunn "please don't shock me again." In response, Officer Gunn told me "f—k you, asshole, how do you like that, that will teach you to run," at which time

1 Officer Gunn tasered me a fourth and fifth time. Officer Gunn tasered me again  
2 and then hit me a number of times with his flashlight.  
3

4 4. City of Burbank Police Officer Baumgarten smashed his knee into my  
5 back area. I do not at this point recall specifically what Officer Edwards did  
6 although he was present.  
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9 I declare under penalty of perjury pursuant to the laws of the State of  
10 California that the foregoing is true and correct.  
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13  
14 Executed this 26th day of April, 2011, at Castaic, California.  
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18 By   
19 Preston Smith  
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**DECLARATION OF MAX A. SAULER, ESQ.**

I, Max A. Sauler, Esq., declare and state as follows:

1. I am an attorney licensed to practice law before the above entitled court. I know the following facts of my own personal knowledge, except where stated on information and belief. If called upon and sworn as a witness, I could and would competently testify thereto.

2. This action arises out of the alleged actions of Defendant Police Officers Gunn, Baumgarten and Edwards, and their employer/Defendant Burbank Police Department, in the course of, during and after the arrest of Plaintiff. This case was initially filed in the Los Angeles Superior Court and removed to this court at the request for removal by Defendants.

3. This case was set for trial to commence on November 8, 2011. Following Plaintiff's notice of the depositions of Defendants Gunn, Baumgarten and Edwards by Plaintiff, counsel for Defendants advised counsel for Plaintiff that because of an on-going Internal Affairs Investigation of the Defendant police officers arising out of the events giving rise to this lawsuit, the Defendants would not testify because of the potential for violations of their 5<sup>th</sup> Amendment rights.

1           4.     Given the inability of Plaintiff to complete his discovery, the parties  
2 entered into a Stipulation vacating the trial and vacating all pre-trial dates, which  
3 was executed by this court on March 1, 2011.  
4

5           5.     As part of the Stipulation (Para. 9 of the Stipulation) the court was  
6 advised that, notwithstanding the proposed Stay, the Defendants' wished to  
7 proceed with the filing and hearing of Motions pursuant to F.R.C.P., Rule 12(c) on  
8 the issue of whether the instant action is barred by *Heck vs. Humphrey* 512 U.S.  
9 447, 114 S.Ct. 2364 (1994).  
10

11           6.     In the same Stipulation (Para. 10) the court was advised of Plaintiff's  
12 contrary position, that the depositions of the individual Defendant Police Officers  
13 must be completed before Plaintiff can oppose the Defendants' *Heck* Motions. The  
14 Order vacating the trial provided that Defendants' *Heck* Motions would be heard  
15 on May 16, 2011.  
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17           7.     Plaintiff's counsel has been advised that the Internal Affairs  
18 investigation arising out of the same set of facts giving rise to this action is still on-  
19 going. After receipt of the Motion for Summary Judgment of Defendants City of  
20 Burbank, Burbank Police Department, Officer Adam Baumgarten and Officer  
21 Michael Edwards the undersigned faxed to Defendants' counsel his request that in  
22 view of the filing of the *Heck* Motion that Plaintiff be permitted to depose the  
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1 Defendant Police Officers. Although counsel for Defendant Gunn responded that  
2 he would not permit his client to be deposed, counsel for the Defendants  
3 Baumgarten and Edwards and the Burbank Police Department has not responded.  
4

5 8. Plaintiff is unable to completely and substantively respond to  
6 Defendants' *Heck* Motion for Summary Judgment without being able to present the  
7 deposition testimony of the Defendant Police Officers. The Defendants' *Heck*  
8 Motion is based on events that transpired in the course of, during and after the  
9 arrest of Plaintiff. The Ninth Circuit case of *Hooper vs. County of San Diego*, 629  
10 F.3d 1127 (9th Cir. 2011) [which case was not cited by the moving parties] holds  
11 that facts surrounding the arrest, and not merely the plea entered by the criminal  
12 defendant, may be considered by the court in ruling on a *Heck* Motion, depending  
13 on the circumstances of the arrest and the alleged excessive force claim. Without  
14 the deposition testimony of the Defendant Police Officers the Plaintiff is unable to  
15 fully and completely respond to the Defendants' *Heck* Motion for Summary  
16 Judgment. Without their deposition testimony, the Plaintiff is unable to inform the  
17 court of the facts and circumstance of his arrest and the excessive force committed  
18 by the Defendants during his arrest. Without this excessive force evidence, the  
19 court is unable to make a determination whether "success in [Plaintiff's] § 1983  
20 claim that excessive force was used during [his] arrest would necessarily imply or  
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1 demonstrate the invalidity of [his] conviction under § 1248 (a) (1).” Whether the  
2 chain of events of his arrest and Plaintiff’s claim of excessive force is, or is not,  
3 one continuous transaction, or whether it makes any difference given the holding in  
4 *Hooper*, cannot be determined without the depositions of the Defendant Police  
5 Officers.  
6

7  
8 9. In order to present the court with evidence of the events that  
9 transpired during his arrest, the depositions of the Defendant Police Officers are  
10 absolutely necessary. Without the testimony that the Defendant Police Officers  
11 will provide the Plaintiff is unable to present material evidence of what transpired  
12 during the course of his arrest and the continuing nature of the arrest, and is  
13 therefore unable to fully and completely respond to the Defendants’ *Heck* Motion  
14 for Summary Judgment.  
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18 10. For all of the foregoing reasons, Plaintiff applies to this court for an  
19 order either denying, deferring order continuing the Defendants’ *Heck* Motion for  
20 Summary Judgment to a future date following the completion of the Internal  
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1 Affairs investigation and after Plaintiff has had an opportunity to depose  
2 Defendants Gunn, Baumgarten and Edwards. This application was initially present  
3 to the court on April 22, 2011, and after attempting to resolve this issue with  
4 defense counsel.  
5

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8 I declare under penalty of perjury pursuant to the laws of the State of  
9 California that the foregoing is true and correct.  
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11  
12 Executed this 26th day of April, 2011, at Woodland Hills, California.  
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14  
15 By  \_\_\_\_\_  
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17 Max A. Sauler, Esq.  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

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4 **I**

5 **UPON GOOD CAUSE SHOWN THE COURT MAY DEFER OR**  
6 **CONTINUE A MOTION FOR SUMMARY JUDGMENT**  
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9 A Rule 56 Motion for Summary Judgment is subject to being denied,  
10 deferred or continued to permit the opposing party to obtain material discovery.  
11

12 F.R.C.P. Rule 56 (d) provides:  
13

14 “When facts are unavailable to the nonmovant, if a  
15 nonmovant shows by affidavit or declaration that, for  
16 specified reasons, it cannot present facts essential to  
17 justify its opposition, the court may:  
18

- 19 (1) defer considering the motion or deny  
20 it;  
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22 (2) allow time to obtain affidavits or  
23 declarations or to take discovery; or  
24  
25 (3) issue any other appropriate order.”  
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II

**A STATE COURT CONVICTION FOR RESISTING**  
**ARREST MAY NOT BAR A SECTION 1983 CLAIM**  
**FOR EXCESSIVE FORCE**

The United States Supreme Court held in *Heck vs. Humphrey* 512 U.S. 447, 114 S.Ct. 2364 (1994) that where a criminal conviction arises out of the “same facts” as the basis for a subsequent 42 U.S.C. § 1983 claim, the 1983 claim must be dismissed. The Ninth Circuit has held that application of the *Heck* bar rests on finding that the criminal conviction (here for violation of California *Penal Code* § 148(a) for resisting arrest) arises out of the “same facts” as the 1983 claim. *Hooper vs. County of San Diego*, 629 F.3d 1127 (9th Cir. 2011).

Just as in the case as bench, the plaintiff in *Hooper* did not contest her guilty plea for violating Section 148(a)(1) nor did she dispute the lawfulness of her arrest. As with Plaintiff Smith, the *Hooper* plaintiff did contend that the defendant police officers used excessive force in response to her resistance.

Here, as pointed out in Section I, *supra*, discovery has not yet been conducted by Plaintiff as to the conduct of the Defendant Police Officers. Therefore, the Plaintiff has not yet conducted discovery material to the factual

1 issues that form the basis of Defendants' *Heck* Motion. Even absent this evidence,  
2 it is Plaintiff's position that the factual circumstance giving rise to his excessive  
3 force claim is separate and apart from the factual basis giving rise to his plea and  
4 conviction for resisting arrest, and therefore, his claims for violation of 42 U.S.C. §  
5 1983 and California *Civil* Code § 52.1, and his causes of action for Intentional  
6 Infliction of Emotional Distress and Assault and Battery, are not barred by the  
7 *Heck* decision.  
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11 In this case, Plaintiff Preston Smith resisted arrest by fleeing the officers; he  
12 resisted, delayed or obstructed the Defendant Police Officers. Once the officers  
13 had control of Preston Smith he was tasered even though he was under their  
14 physical control and was not resisting arrest, giving rise to Plaintiff's claims.  
15  
16

17 In *Hooper, supra*, the court recognized that:

18 "[T]he California Supreme Court held that a conviction  
19 under § 148(a)(1) can be valid even, if, in a single  
20 continuous chain of events, some of the officer's conduct  
21 was unlawful. *Yount vs. City of Sacramento*, 43 Cal.4<sup>th</sup>  
22 885, 76 Cal.Rptr.3d 787 (2008). According to the Court,  
23 a conviction under § 148(a)(1) requires only that some  
24 lawful police conduct was resisted, delayed, or obstructed  
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1 during the continuous chain of events.” (629 F.3d at  
2 1131.)  
3

4 The *Hooper* court went on to recognize that *Yount* held that the plaintiff’s  
5 “...claim was not *Heck*-barred because § 148(a)(1) contains no requirement that  
6 there be a distinct temporal separation between the use of reasonable force and the  
7 use of excessive force. If, at some time during the ‘continuous transaction’  
8 between an individual an officer, the individual ‘resists, delays, or obstructs’, the  
9 officer in the lawful performance of his or her duty, that is a violation of §  
10 148(a)(1). The individual’s ‘resisting, delaying or obstructing’, the officer does  
11 not lose its character as a violation of § 148(a)(1) if, at some other time during the  
12 same ‘continuous transaction,’ the officer uses excessive force or otherwise acts  
13 unlawfully.” (629 F.3d at 1132.) [Emphasis added.]  
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18 The *Hooper* court determined that “[t]he question before us is the basic *Heck*  
19 question – whether success in *Hooper*’s § 1983 claim that excessive force was used  
20 during her arrest ‘would necessarily imply’ or ‘demonstrate’ the invalidity of her  
21 conviction under § 148(a)(1). Given California law, as clarified in *Yount*, we hold  
22 that it would not.” (629 F.3d at 1133.)  
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1 The factual issues raised by Plaintiff's excessive force claims, and whether  
2 they are *Heck*-barred, must be viewed in a light most favorable to the party  
3 opposing the defendant's Motion for Summary Judgment.  
4

5 Defendants City of Burbank, Burbank Police Department, Officers  
6 Baumgarten and Edwards argue in their Motion for Summary Judgment that, "...  
7 the criminal record demonstrates that Plaintiff violated *Penal Code* § 148(a)(1)  
8 during the entire period of time that he interacted with Offices Barumgarten and  
9 Edwards." [Motion for Summary Judgment, 9:21 - 23.] That is not the case.  
10 Other than the attached Smith Declaration, the record before this court does not  
11 resolve the factual issues of the timing of the sequence of events during the  
12 numerous times Smith was tasered. In fact, the record presented by the moving  
13 party's does not even mention that Preston Smith was tasered, why the Plaintiff  
14 was tasered, how many times he was tasered or when in the course of the chase,  
15 detention and arrest the Plaintiff was tasered, or who was present when he was  
16 tasered. Nor does it resolve the excessive force issues alleged to have been  
17 perpetrated on the Plaintiff by the moving parties. All of these factual issues have  
18 to be addressed before a full hearing on Defendants' *Heck* Motion may be had.  
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1 The *Hooper* court unequivocally held that:

2 “[W]e conclude that a conviction under California  
3 *Penal Code* § 148(a)(1) does not bar a § 1983 claim for  
4 excessive force under *Heck* when the conviction and the  
5 § 1983 claim are based on different actions during ‘one  
6 continuous transaction.’” (629 F.3d at 1133.)  
7

8  
9 The *Hooper* case stands for the proposition that there need not be a distinct  
10 temporal separation in the “continuous transaction.” Therefore, an arrest might be  
11 initially lawful and later use of excessive force is actionable and not barred by  
12  
13 *Heck*.  
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15 At the very least, the facts in the case at bench present triable issues of fact  
16 preventing entry of a Summary Judgment.  
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### 18 III

### 19 CONCLUSION

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24 For all of the foregoing reasons, this court should deny Defendant’s Motion  
25 for Summary Judgment or, in the alternative, deny, defer or continue Defendants’  
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1 Motion pending completion of the depositions of the Defendant Police Officers.  
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4 DATED: April 26th, 2011

LAW OFFICES OF MANUEL H. MILLER

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7 By 

Max A. Sauler, Esq.

Attorneys of Record of Plaintiff  
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1                                   **PROOF OF SERVICE**  
2                                   UNITED STATES DISTRICT COURT  
3                                   STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

4 CASE NAME: PRESTON SMITH V. CITY OF BURBANK, ET AL.  
5 CASE NUMBER: CV10-8840-VBF (AGR<sub>x</sub>)

6           I am employed in the County of Los Angeles, State of California. I am over  
7 the age of 18 and not a party to the within action; my business address is: 20750  
8 Ventura Blvd, Suite 440, Woodland Hills, CA 91364.

9           On April 26, 2011, I served the foregoing document described as:  
10 **PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT,**  
11 **APPLICATION FOR AN ORDER DENYING, DEFERRING OR**  
12 **CONTINUING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**  
13 **DECLARATIONS OF PLAINTIFF PRESTON SMITH AND MAX A.**  
14 **SAULER, ESQ., IN SUPPORT OF APPLICATION, MEMORANDUM OF**  
15 **POINTS AND AUTHORITIES,** in this action by placing a true coy thereof in a  
16 sealed envelope addressed as follows:

17                                   ***PLEASE SEE ATTACHED SERVICE LIST***

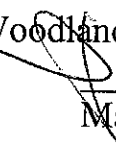
18 **[X] BY MAIL**

19 As follows: I am "readily familiar" with the firm's practice of collection and  
20 processing correspondence for mailing. Under that practice it would be  
21 deposited with U.S. postal service on that same day with postage thereon  
22 fully prepaid at Woodland Hills, California in the ordinary course of  
23 business. I am aware that on motion of the party served, service is presumed  
24 invalid if postal cancellation date or postage meter date is more than one day  
25 after date of deposit for mailing the affidavit.

26 **[X] FEDERAL**

27 I declare that I am employed in the office of a member of the bar of this  
28 Court at whose direction that service was made.

Executed on April 26, 2011, at Woodland Hills, California

  
Maryam Rance

1 2 3 4 5 6 7	Dennis A. Barlow, City Attorney Juli C. Scott, Chief Assistant City Attorney Carol A. Humiston, Senior Asst. City Attorney Office of the City Attorney 275 E. Olive Avenue P.O. Box 6459 Burbank, CA 91510-6459	Attorneys for Defendants
8 9 10 11 12 13	David D. Lawrence, Esq. Dennis M. Gonzalez, Esq. Nathan A. Oyster, Esq. Lawrence Beach Allen & Choi, PC. 100 W. Broadway, Suite 1200 Glendale, CA 91210-1219 Tel: 818-545-1925 Fax: 818-545-1937	Attorneys for Defendant